JOSEPH E. SHORIN III
ANDREW A. FITZ
Assistant Attorneys General
PO Box 40117
Olympia, WA 98504-0117
Phone: (360) 586-6770

The Honorable Alan A. McDonald
Hearing Date: January 11, 2005
Hearing Time: 10:00 AM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. SPENCER ABRAHAM, Secretary of Energy, et al., Defendants.	**NO. CT-03-5018-AAM** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
COLUMBIA RIVERKEEPER, et al., Plaintiffs, v. SPENCER ABRAHAM, Secretary of Energy, et al., Defendants.	NO. CT-03-5044-AAM *consolidated*

COMES NOW the Plaintiff State of Washington (Washington or State) and provides this memorandum in support of its Motion for Partial Summary Judgment. Washington moves for summary judgment on Count 3 of its First Amended Complaint, which alleges violations of the "storage prohibition" of the Washington

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Hazardous Waste Management Act (HWMA) implementing regulations, Wash. Admin. Code 173-303-140(2)(a). *See* State of Washington's First Amended Complaint for Declaratory and Injunctive Relief (Amended Complaint) at ¶¶ 40-43. Within Count 3, Washington and the United States Department of Energy (DOE) have also conditioned the applicability of certain requirements of the Hanford Federal Facility Agreement and Consent Order (HFFACO) regarding the storage and treatment or certification of mixed transuranic waste (TRUM) on the outcome of this Court's ruling as to the scope and applicability of an exemption for "transuranic mixed waste designated by the Secretary [of Energy] for disposal at WIPP" contained in 1996 amendments to the federal Waste Isolation Pilot Plant (WIPP) Land Withdrawal Act. *Id*.

This memorandum is supported by the attached Affidavit of Andrew Fitz, documents referenced and attached therein, and affidavits previously filed with the Court in support of Washington's Motion for Preliminary Injunction and Washington's Motion for Expanded Preliminary Injunction.

I. ISSUES PRESENTED

1. Whether the ongoing storage of mixed transuranic waste at the Hanford Reservation, including waste identified as "designated by the Secretary [of Energy] for disposal at WIPP": (1) violates the prohibition on storage of land disposal restricted waste under Wash. Admin. Code 173-303-140(2)(a) (incorporating by

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

reference 40 C.F.R. § 268.50); and (2) is subject to exemption from the storage prohibition under the WIPP Land Withdrawal Amendment Act of 1996, Pub. L. 104-201, § 3188(a)(1) (Section 9(a)(1)).

2. Whether the prospective storage of off-site mixed transuranic waste intended for shipment to, and storage at, the Hanford Reservation, including waste identified as "designated by the Secretary [of Energy] for disposal at WIPP": (1) will violate the prohibition on storage of land disposal restricted waste under Wash. Admin. Code 173-303-140(2)(a) (incorporating 40 C.F.R. § 268.50 by reference); and (2) is subject to exemption from the storage prohibition under the WIPP Land Withdrawal Amendment Act of 1996, Pub. L. 104-201, § 3188(a)(1) (Section 9(a)(1)).

II. BACKGROUND

Between 1943 and 1987, the United States produced plutonium at DOE's Hanford Site for use in nuclear weapons. Plutonium production and other activities at Hanford created enormous amounts of radioactive, hazardous, and mixed wastes, some of which were disposed of directly into the ground, some of which were stored in various forms at Hanford, and much of which remains at the Site today, still awaiting cleanup and/or disposal. Affidavit of Laura Cusack in Support of Motion for Expanded Preliminary Injunction (Expanded PI Cusack Aff.) ¶¶ F-H.

Among the wastes generated during plutonium production at Hanford were large quantities of transuranic wastes. Transuranic wastes are wastes that have been contaminated with radioactive elements that have an atomic number higher than that

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

of uranium. By definition, transuranic wastes contain more than 100 nanocuries of alpha-emitting transuranic isotopes per gram of waste, and have half-lives of greater than 20 years. Transuranic wastes contain radioactive elements such as plutonium.

Some transuranic wastes also contain hazardous constituents and are known as mixed transuranic wastes, or TRUM.[1] As a result of containing hazardous constituents, they are regulated under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq*. or, if they are located in a state with a RCRA-authorized hazardous waste program, under a RCRA-corollary state law. Washington's Hazardous Waste Management Act is such a law.

There are at least 37,000 drums and 1,200 large boxes of buried waste at Hanford placed in so-called "retrievable storage" since 1970. Together, these wastes total approximately 15,000 cubic meters, or an amount sufficient to fill 75,000 55-gallon drums. These buried wastes have not be characterized ("designated") as required by Washington Administrative Code 173-303-070 to determine what, if any, hazardous constituents may be present in the waste and how these constituents will affect the safe storage, management, treatment, and disposal of the waste. Because the

---

[1] Where necessary to distinguish between transuranic wastes that are mixed and those that are not, this memorandum refers to "TRUM" (if mixed) and "TRU" (if not mixed). Use of the term "transuranic waste" will refer to the entire category of such waste, regardless of whether they are mixed.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

retrievably stored wastes have not been so characterized, they are all suspect mixed waste and must be managed as mixed waste. Ultimately, Ecology expects that part of the retrievably stored wastes will be determined to be TRU or TRUM and part will be determined to be low-level or mixed low-level radioactive waste. *See* Expanded PI Cusack Aff. ¶¶ H, N, P.

Between this retrievably stored waste and additional Hanford TRUM located in above ground storage, there is a large backlog of TRUM at Hanford awaiting treatment and disposal. *See* Expanded PI Cusack Aff. ¶¶ H, P. There is already more than a sufficient quantity of TRUM at Hanford to facilitate proper recovery, treatment, or disposal of the waste. Affidavit of Roger F. Stanley in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction (Stanley Aff.) ¶ N.

As of March 4, 2003, when the State filed this lawsuit, there were no milestones in the Hanford Federal Facility Agreement and Consent Order (HFFACO) or other enforceable commitments for treating, certifying for shipment, and shipping Hanford's TRUM to the Waste Isolation Pilot Plant (WIPP) in New Mexico, the presumed disposal facility for the waste. Nor were there enforceable schedules for the development of the capabilities needed to retrieve, process or treat Hanford TRUM.

As a consequence, on March 10, 2003, the Director of Ecology issued a "Final Determination" pursuant to the HFFACO in the matter of HFFACO Milestone Series M-91, establishing a compliance schedule for DOE to secure the necessary capabilities. On April 30, 2003, Ecology issued an Administrative Order to DOE

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

providing a compliance schedule for the retrieval, designation, and treatment (and in the case of TRUM, treatment or certification) of Hanford's "retrievably stored" waste, and for treatment of certain other mixed waste stored at Hanford.

DOE appealed or otherwise challenged these decisions in separate proceedings filed in state and federal court and before the Washington State Pollution Control Hearings Board. As part of its challenges, DOE contested the Washington State Department of Ecology's authority to apply treatment or certification requirements and the HWMA's "storage prohibition" to Hanford's TRUM waste.

The United States and Washington entered into a settlement of the above-referenced litigation. As part of the settlement, the United States and the State have agreed to add compliance schedules to the HFFACO for the retrieval and designation of DOE's "retrievably stored" waste, and for the treatment of certain other mixed waste stored at the Hanford Site. The United States and Washington continue to disagree over whether the State has legal authority to require DOE to treat or certify TRUM. As a result, the United States and the State have conditioned the applicability of certain HFFACO requirements regarding the storage and treatment or certification of TRUM on the outcome of this Court's ruling as to the scope and applicability of an exemption for "transuranic mixed waste designated by the Secretary [of Energy] for disposal at WIPP" contained in 1996 amendments to the federal WIPP Land Withdrawal Act. *See* Affidavit of Andrew A. Fitz (Fitz Aff.) Ex. 20 (M-91 HFFACO Change Package).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Prior to these events, on September 6, 2002, DOE published a Record of Decision in the Federal Register indicating that DOE had decided to transfer transuranic waste (including TRUM) from two sites, the Battelle Columbus Laboratory (Battelle) and the Energy Technology Engineering Center (ETEC), to Hanford. *See Revision to the Record of Decision for the Department of Energy's Waste Management Program: Treatment and Storage of Transuranic Waste* (2002 ROD), Fitz Aff. Ex. 4 (67 Fed. Reg. 56989). The waste was to be transferred to Hanford for treatment and/or storage pending expected ultimate disposal at WIPP. *Id*.

On March 4, 2003, Washington filed a complaint in this Court seeking declaratory and injunctive relief against Defendants. Washington's complaint alleged that DOE's decision to ship Battelle and ETEC transuranic waste to Hanford violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, and the HWMA, Wash. Rev. Code 70.105.

On March 5, 2003, Washington moved for a preliminary injunction on the basis of both its NEPA and HWMA claims. With respect to the HWMA claim, the State argued, among other things, that the Secretary of Energy had failed to "designate for disposal at WIPP" the Battelle and ETEC TRUM. *See* Memorandum in Support of Motion for Preliminary Injunction at 28-35. On May 9, 2003, the Court granted a preliminary injunction on the basis of Washington's argument that DOE had violated NEPA. *See* Order Granting Motion for Preliminary Injunction.

In January 2004, DOE issued the *Hanford Site Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement* (HSW EIS), Affidavit

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

of Max S. Power in Support of Motion for Expanded Preliminary Injunction or Temporary Restraining Order (Expanded PI Power Aff.) ¶ CC. The HSW EIS is purported by DOE to cure the NEPA defects alleged by the State. On June 30, 2004, DOE published three Records of Decision in the Federal Register that are relevant to this motion. All three RODs are dated June 23, 2004.

First, DOE published a *Record of Decision for the Solid Waste Program, Hanford Site, Richland, Washington: Storage and Treatment of Low-Level Waste and Mixed Low-Level Waste; Disposal of Low-Level Waste and Mixed Low-Level Waste, and Storage, Processing, and Certification of Transuranic Waste for Shipment to the Waste Isolation Pilot Plant* (HSW EIS ROD). Fitz Aff. Ex. 1 (69 Fed. Reg. 39449). The HSW EIS ROD includes a decision by DOE to develop capabilities at Hanford necessary to store, process, certify, and eventually ship to WIPP both Hanford originated transuranic waste and up to 1,550 cubic meters of off-site transuranic waste transferred to Hanford from other DOE facilities. *Id.* at 39455.

Second, DOE published a *Revision to the Record of Decision for the Department of Energy's Waste Management Program: Treatment and Storage of Transuranic Waste* (2004 TRU ROD). Fitz Aff. Ex. 2 (69 Fed. Reg. 39446). The 2004 TRU ROD reaffirms DOE's earlier (2002) decision to ship remote-handled and contact-handled transuranic wastes from Battelle to Hanford for storage and treatment pending disposal at WIPP. *Id*. The ROD also indicates that the Battelle and ETEC TRUM was originally designated for disposal at WIPP in a prior record of decision

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

entitled the WIPP II SEIS ROD (which included a general decision to dispose of up to 175,600 cubic meters of defense TRUM generated form various DOE sites). *See* Fitz Aff. Ex. 2 at 39448 (2004 TRU ROD).

Third , DOE published a *Revision to the Record of Decision for the Department of Energy's Waste Isolation Pilot Plant Disposal Phase* (2004 WIPP ROD). Fitz Aff. Ex. 3 (69 Fed. Reg. 39456). In this ROD, DOE decides to dispose of at WIPP up to 2,500 cubic meters of transuranic waste containing polychlorinated biphenyls (PCBs) in concentrations greater than 50 parts per million (ppm). The ROD also purports to "designate" TRUM for disposal at WIPP within the meaning of the 1996 WIPP Withdrawal Act. *Id*. at 39458.

On July 19, 2004, Washington filed a motion to amend Washington's complaint. On August 13, 2004, the Court issued an order granting the State's motion to amend its complaint. Washington filed and served its amended complaint on August 19, 2004. The amended complaint alleges that the storage at Hanford of TRUM from other DOE sites, as well as the continued storage of TRUM already at Hanford, violates or would violate the "storage prohibition" set forth in Washington Administrative Code 173-303-140(2)(a). Amended Complaint ¶¶ 129–138.

III. ARGUMENT

The storage of TRUM waste at Hanford—including the storage of any off-site TRUM—violates Washington's Hazardous Waste Management Act (HWMA), Wash. Rev. Code 70.105, and its implementing Dangerous Waste Regulations, Wash. Admin. Code 173-303. More specifically, such storage violates the HWMA's

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

prohibition of the storage of "land disposal restricted" (LDR) waste unless such storage is "necessary to facilitate proper recovery, treatment, or disposal" of the waste. Wash. Admin. Code 173-303-140(2)(a) (and by reference, 40 C.F.R. § 268.50). This violation will continue unabated for as long as TRUM is stored at Hanford unless DOE either (1) provides for treatment of the waste to LDR standards, or (2) is subject to an enforceable compliance schedule that provides for certification dates for the waste to be moved to WIPP in lieu of such treatment.

A. Storage of TRUM at Hanford Violates the LDR Storage Prohibition Because Such Storage is Not Necessary to Facilitate the Proper Recovery, Treatment, or Disposal of the Waste

Through the HWMA and its implementing Dangerous Waste Regulations, the State of Washington administers a state hazardous waste program authorized under the federal Resource and Conservation Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq*. The HWMA provides for comprehensive regulation of the generation, transportation, storage, treatment, and disposal of hazardous waste (usually referred to as "dangerous waste" under state law). Authorized portions of the State's program under the HWMA stand in lieu of RCRA as operative law in Washington, *see* 42 U.S.C. § 6926(b), including with respect to "land disposal restrictions" (LDRs) established for hazardous waste under RCRA.[2] RCRA's LDRs are incorporated by

[2] Washington's program became authorized by the United States Environmental Protection Agency (EPA) to administer LDRs in 1997.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

reference into the Dangerous Waste Regulations to become requirements of state law through Wash. Admin. Code § 173-303-140(2)(a).[3]

LDRs are the result of 1984 RCRA amendments intended to curb the amounts of hazardous waste disposed to landfills and other land-based units.[4] Put simply, LDRs prohibit the disposal to land of specified wastes unless the wastes have first been treated to disposal standards set forth in 40 C.F.R. § 268.41-.49. *See* 40 C.F.R. § 268.30-.39. LDRs also prohibit the storage of LDR-subject wastes at RCRA permitted treatment, storage, or disposal facilities (such as Hanford) as follows:

> (a) Except as provided in this section, *the storage of hazardous wastes restricted from land disposal* under subpart C of this part of RCRA section 3004 *is prohibited*, unless the following conditions are met:
>
> . . .
>
> (2) An owner/operator of a hazardous waste treatment, storage, or disposal facility stores such wastes in tanks, containers, or containment buildings *solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal* . . . .

40 C.F.R. § 268.50(a)(2) (emphasis added).

---

[3] For the Court's ease, LDR citations will be to the LDR rules promulgated by the EPA at 40 C.F.R. Part 268, which are incorporated by reference into the state Dangerous Waste Regulations by Wash. Admin. Code § 173-303-140(2)(a).

[4] The LDRs are codified at 42 U.S.C. § 6924.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Significantly, the storage prohibition exists even in light of RCRA's other "safe storage" requirements that address matters such as inspection requirements, contingency planning, and container condition. The rationale for the storage prohibition is that:

> Congress believed that permitting storage of large quantities of waste as a means of forestalling required treatment would involve health threats equally serious to those posed by land disposal, and therefore opted in large part for a "treat as you go" regulatory regime.

Hazardous Waste Treatment Coun. v. United States Envtl. Prot. Agency, 886 F.2d 355, 357 (D.C. Cir. 1989).

The LDR storage prohibition establishes a presumption regarding whether storage is within the narrow scope of allowed storage. A hazardous waste treatment, storage, or disposal facility may store LDR wastes for up to one year unless the state can demonstrate that such storage is *not* solely for the purpose of accumulating such quantities of hazardous waste "as necessary to facilitate proper recovery, treatment, or disposal." 40 C.F.R. § 268.50(b). If such storage extends beyond one year, the facility bears the burden of proving that the storage is solely for the purpose of accumulating sufficient quantities to facilitate proper recovery, treatment, or disposal. 40 C.F.R. § 268.50(c). Mixed wastes at Hanford, other DOE facilities, and private facilities are subject to LDR storage and disposal prohibitions even if there is a current lack of treatment capacity or suitable treatment technology. *See Edison Elec. Institute v. United States Envtl. Prot. Agency*, 996 F.2d 326, 336 (D.C. Cir. 1993)

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

(LDR storage prohibition applies to mixed waste for which there are few treatment or disposal options, "consistent with RCRA's status as a highly prescriptive, technology-forcing statute").

The Hanford Site is out of compliance with the LDR storage prohibition with respect to TRUM already at the site. DOE is not storing TRUM at Hanford "solely for the purpose of accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal." 40 C.F.R. § 268.50(2). There is already more than sufficient TRUM on site for these purposes. Stanley Aff. ¶ N.

Likewise, from the moment off-site TRUM waste is brought to the Hanford facility, it too will violate the LDR storage prohibition. Off-site TRUM is not proposed for shipment to Hanford solely to allow for "the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal" *at the Hanford facility*. 40 C.F.R. § 268.50(c). Instead, the wastes are proposed for storage at Hanford for other reasons: to shift TRUM away from other sites to allow the early closure of those sites; because of a lack of current characterization capacity at those sites; because of a desire on the part of DOE to eliminate storage currently utilized for TRUM at those sites; and, at the heart of matters, because of DOE's desire to save money spent at other sites. *See Revision to the Record of Decision for the Department of Energy's Waste Management Program: Treatment and Storage of Transuranic* Waste (2002 Revised ROD), Fitz Aff. Ex. 4 (67 Fed. Reg. 56989). Whatever merits these considerations might have from DOE's perspective, none of the reasons comport with the strict confines of the LDR storage

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

prohibition. Storing this waste at Hanford will simply add to the already backlogged Hanford TRUM awaiting its next disposition. As a matter of law, such storage does not comply with 40 C.F.R. § 268.50.

B. The WIPP Land Withdrawal Amendment Act Does Not Exempt Hanford TRUM from the LDR Storage Prohibition

DOE contends that the WIPP Land Withdrawal Amendment Act of 1996 (LWA), Pub. L. 104-201, § 3188(a)(1) (Section 9(a)(1)), exempts TRUM stored at Hanford, or earmarked for storage at Hanford, from the LDR storage prohibition, both under RCRA and RCRA-corollary state law such as the HWMA.[5] DOE's position extends to TRUM stored at every DOE site across the country that may, some day, be disposed of at WIPP. However, the plain language of Section 9(a)(1) and the legislative history surrounding the section run counter to DOE's position. Furthermore, any arguable conflict between LWA Section 9(a)(1) and the LDR storage prohibition can be harmonized by application of the "site treatment plan" provisions of the Federal Facility Compliance Act (codified in RCRA), 42 U.S.C. § 6939c(b), which are specifically intended by Congress to provide a compliance schedule for addressing storage prohibition violations at federal facilities. This avoids any need to render the storage prohibition inoperative.

---

[5] A complete copy of the WIPP LWA, Pub. L. 102-579, including the 1996 amendments effected through Pub. L. 104-201, is attached as Exhibit 5 to the Affidavit of Andrew A. Fitz.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

1. The Plain Language of LWA Section 9(a)(1) Does Not Exempt TRUM Designated for Disposal at WIPP from Application of the LDR Storage Prohibition

Section 9(a)(1) of the LWA provides for the express application of a number of environmental laws to the WIPP facility, and for the exemption from LDR treatment standards and disposal prohibitions for TRUM "designated by the Secretary for disposal at WIPP." Pub. L. 104-201, § 3188(a)(1) (Section 9(a)(1)). Section 9(a)(1) provides in full:

> (1) Applicability: Beginning on the date of the enactment of this Act, the Secretary *shall comply with respect to WIPP*, with:
>
> > (A) the regulations issued by the Administrator establishing the generally applicable environmental standards for the management and storage of spend nuclear fuel, high-level radioactive waste, and transuranic radioactive waste and contained in subpart A of part 191 of title 40, Code of Federal Regulations;
> >
> > (B) the Clean Air Act (40 U.S.C. 7401 et seq.);
> >
> > (C) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);
> >
> > (D) title XIV of the Public Health Service Act (42 U.S.C. 300f et seq.; commonly referred to as the "Safe Drinking Water Act");
> >
> > (E) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.);
> >
> > (F) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
> >
> > (G) all other applicable Federal laws pertaining to public health and safety of the environment; and
> >
> > (H) all regulations promulgated, and all permit requirements, under the laws described in subparagraphs (B) through (G)
>
> With respect to transuranic mixed waste designated by the Secretary for disposal at WIPP, such waste is *exempt from treatment standards*

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> *promulgated pursuant to section 3004(m)* of the Solid Waste Disposal Act (42 U.S.C. 6924(m)) and *shall not be subject to the land disposal prohibitions in section 3004(d), (e), (f), and (g)* of the Solid Waste Disposal Act.

Pub. L. 104-201, § 3188(a)(1) (Section 9(a)(1)) (emphasis added).

Also of relevance are the savings provisions of the LWA, found in Section 14. These provisions provide in full:

> (a) CAA AND SWDA: *Except for the exemption from the land disposal restrictions described in section 9(a)(1)*, no provision of this Act may be construed to supersede or modify the provisions of the Clean Air Act (42 U.S.C. 7401 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).
>
> (b) EXISTING AUTHORITY OF EPA AND *STATE*: No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or *the State's* authority to enforce, or the Administrator's obligation to comply with:
>
> (1) the Clean Air Act (42 U.S.C. 7401 et seq.);
>
> (2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), *except that the transuranic mixed waste designated by the Secretary for disposal at WIPP is exempt from the land disposal restrictions described in section 9(a)(1)*; or
>
> (3) *any other applicable* clean air or *hazardous waste law*.

Pub. L. 104-201, Section 14 (emphasis added). Section 2(16) of the LWA defines "State" under Act as the State of New Mexico. Pub. L. 102-579, Section 2(16).

While Section 9(a)(1) of the LWA exempts TRUM "designated by the Secretary" from the LDR treatment standards and disposal prohibition (both of which come into play *when TRUM is disposed at WIPP*), the plain language of this section does *not* exempt designated TRUM from application of the LDR storage prohibition

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

at DOE sites around the country. By its own terms, the exemption operates upon specifically enumerated portions of RCRA's LDR provisions. Congress specifically identified the LDR treatment standards promulgated by the U.S. Environmental Protection Agency (EPA) pursuant to 42 U.S.C. § 6924(m) and the LDR disposal prohibitions found in 42 U.S.C. § 6924(d)-(g). However, Congress did *not* reference RCRA's LDR storage prohibition, which is found in 42 U.S.C. § 6924(j). After having expressly exempted transuranic waste designated for disposal at WIPP from five subsections of the same statute by listing them specifically, Congress chose *not* to list the LDR storage prohibition contained in subsection (j).

This is confirmed in the savings provisions of the LWA, which operate on only those items specifically "described" in Section 9(a)(1). LWA Section 14(a) provides that no provision of the LWA "may be construed to supersede or modify" the provisions of RCRA, "except for the exemption from the land disposal restrictions *described in section 9(a)(1)*)." Pub. L. 104-201, Section 14(a) (emphasis added). Section 14(b) provides that no provision of the LWA may be construed to "limit, or in any manner affect" the authority of the EPA Administrator or the State of New Mexico to enforce RCRA, except that TRUM designated by the Secretary for disposal at WIPP "is exempt from the land disposal restrictions *described in section 9(a)(1)*." Pub. L. 104-201, Section 14(b) (emphasis added). Once again, the storage prohibition, 42 U.S.C. § 6924(j), is nowhere "described" in Section 9(a)(1).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

The inclusion of certain provisions implies the exclusion of others. *United States v. Kakatin*, 214 F.3d 1049, 1051 (9th Cir. 2000). Where a statute expressly enumerates requirements on which it is to operate, additional requirements are not to be implied. *Trayco, Inc. v. United States*, 994 F.2d 832, 836 (Fed. Cir. 1993). The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026 (1989). The plain reading of LWA Section 9(a)(1) is that Congress did not intend for its exemption of certain requirements *to apply at WIPP* to extend to preclude an entirely different matter, the application of the LDR storage prohibition at every DOE site in the country (which in many cases is applied under the authority of state law, and not RCRA).

DOE nevertheless maintains that subsection (j) should effectively be read into Section 9(a)(1). DOE argues that because the RCRA storage prohibition applies to hazardous waste "which is prohibited from land disposal," and because waste "designated by the Secretary for disposal at WIPP" is exempt from land disposal prohibitions, such waste is likewise exempt from RCRA's storage prohibition and any RCRA-corollary state laws. *See, e.g.,* Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 65.

DOE's argument is premised on the implied amendment of RCRA and the implied preemption of RCRA-corollary state laws by the LWA. Amendment by implication, however, may only be found where legislative intent is clear and

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

manifest. *United States v. Dahl,* 314 F.3d 976, 978 (9th Cir. 2002). It is not favored in statutory construction. *United States v. Welden*, 377 U.S. 95, 103 n.12, 84 S. Ct. 1082 (1964); *Cheney R.R. Co., Inc. v. R.R. Ret. Bd.*, 50 F.3d 1071, 1078 (D.C. Cir. 1995).

Likewise, there is a strong presumption against finding that state law is preempted by federal law. *Comm. of Dental Amalgam Mfrs. & Distributors v. Stratton*, 92 F.3d 807, 811 (9th Cir. 1996). Once again, a clear and manifest congressional intent to preempt state law must be present. *In re Cybernetic Services, Inc.,* 252 F.3d 1039, 1046 (9th Cir. 2001), *cert. denied Moldo v. Matsco, Inc.,* 534 U.S. 1130 (2002). There is a presumption in favor of the validity of state law, and courts are not to seek out conflicts between state and federal regulation where none clearly exist. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446, 80 S. Ct. 813 (1960).

As demonstrated below, DOE's construction is contrary to both the legislative history of LWA Section 9(a)(1) and the policy behind both Section 9(a)(1) and the LDR storage prohibition. It also ignores the opportunity to harmonize any arguable conflict between Section 9(a)(1) and the storage prohibition through application of the site treatment plan provisions of the Federal Facility Compliance Act. Based on this, DOE cannot meet its burden of showing "clear and manifest congressional intent" to amend RCRA and preempt state law by implication.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

2. The Legislative History of LWA Section 9(a)(1) Does Not Indicate an Intent to Limit Applicability of the LDR Storage Prohibition at DOE Sites Around the Country

Relevant legislative history related to the LWA Section 9(a)(1) exemption begins in 1995, when Senator Craig of Idaho introduced a stand-alone bill in the Senate (S. 1402) and Representative Skeen of New Mexico introduced a stand-alone bill in the House (H.R. 1663), both of which contained provisions related to the application of LDR provisions to WIPP. Ultimately, the Section 9(a)(1) exemption was enacted in 1996 as a part of the National Defense Authorization Act for Fiscal Year 1997. The Senate and House each passed defense authorization bills in 1996—S 1745 and H.R. 3230—that were resolved in conference to result in, among other things, the current LWA Section 9(a)(1) exemption.

Five key points can be drawn from the legislative history of the Section 9(a)(1) exemption, beginning with the Senate and House bills that preceded the final legislation. First, the clear purpose of the exemption is to speed up the disposal of TRUM at WIPP by removing obstacles to disposal *once TRUM arrives at WIPP*. Second (and the converse of the first point), the legislative history of the exemption is *completely silent* regarding *any* intent to amend RCRA and preempt state law by lifting the storage prohibition related to TRUM at *other* DOE facilities around the country. Third, the legislative history repeatedly recognizes that the impetus for speeding up the disposal of TRUM at WIPP is to eliminate the hazards associated with continued long-term storage of TRUM at DOE facilities across the country, which is consistent with the rationale of the storage prohibition. Fourth, the evolution

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

of the specific language of the Section 9(a)(1) exemption from earlier bills to the final language supports the plain-language reading of the exemption argued above; namely, that Congress was acting with intent when it specifically enumerated only the LDR treatment standards and disposal prohibitions, and not the storage prohibition. Finally, the history confirms Congress' desire to preserve independent regulatory oversight of DOE activity.

Senator Craig was a key sponsor of the defense authorization legislation (S. 1745) that was ultimately enacted to amend the WIPP Land Withdrawal Act. Prior to this, the Senator introduced S. 1402 in November 1995. Before introducing S. 1402, Senator Craig submitted a series of questions concerning WIPP to EPA. EPA provided its response on September 8, 1995. *See* Fitz Aff. Ex. 6. The EPA response appears to have informed Senator Craig's draft legislation.

Question 5 in Senator Craig's letter relates to the application of the LDR disposal prohibition in 42 U.S.C. § 6924(d), and specifically the requirement within that subsection that EPA make a "no migration determination" before the disposal of mixed waste *not* treated to specified LDR standards could be allowed. The issue of a no-migration determination was significant to the opening of WIPP. Under 42 U.S.C. § 6924(d), land disposal of hazardous waste that has *not* been treated to meet LDR treatment standards cannot be determined to be protective of the environment unless it is demonstrated that "there will be no migration of hazardous constituents from the disposal unit . . . for as long as the wastes remain hazardous." 42 U.S.C. § 6924(d)(1)(C). DOE was actively seeking a no-migration determination from EPA

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

for WIPP at the time of Senator Craig's letter. *See* Fitz Aff. Ex.12 at 13 (testimony of DOE Carlsbad Area Office manager George E. Dials). Gaining such a determination would relieve DOE of having to treat TRUM to LDR standards prior to disposal at WIPP. Gaining the determination, however, was seen as an obstacle to opening WIPP.

The Senator's question and EPA's response are relevant as providing the only references to 40 C.F.R. Part 268 (the LDRs) in the letter exchange. As the Court can see, the exchange focuses exclusively on the application of 42 U.S.C. § 6924(d) and a no-migration determination *at WIPP*. There is no reference whatsoever to the storage prohibition, or of any effects beyond the confines of the WIPP facility:

> 5. Does the EPA agree that compliance with the radionuclide release standards in 40 C.F.R. 191 will reasonably assure that the Agency's environmental protection objectives are satisfied and that, given the relatively minor quantities of RCRA hazardous constituents, a demonstration of no-migration under 40 C.F.R. 268 does not significantly contribute to those objectives?
>
> Response: The Agency believes that WIPP compliance with the radionuclide containment standards established in 40 C.F.R. Part 191 is an important component in meeting the Agency's environmental objectives. The containment standards for radionuclides, combined with the ground water protection standard, the individual protection requirements, and the assurance requirements will provide an adequate level of protection from radionuclide releases.
>
> The Agency's view of whether a demonstration of no-migration of hazardous constituents from WIPP pursuant to RCRA § 3004(d) would contribute any significant additional protection of human health and the environment is as follows: (1) The Agency believes that the human health and environmental hazards presented by the radioactive portion of the waste outweigh the hazards presented by the RCRA hazardous constituents portion of the waste; (2) The Agency also believes that

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> compliance with its comprehensive regulatory scheme under the Atomic Energy Act (40 C.F.R. Part 191), the extensive WIPP Compliance Criteria (40 C.F.R. Part 194), and RCRA permit requirements (40 C.F.R. 264) will also adequately protect human health and the environment from releases of RCRA hazardous constituents.
>
> In this light, the Agency, therefore, believes that *in the narrow context of the WIPP*, which is subject to comprehensive regulation under the AEA, the WIPP LWA, and RCRA, *that a demonstration of no migration of hazardous constituents will not be necessary to adequately protect human health and the environment.*
>
> Nevertheless, absent legislation to the contrary, EPA will continue to implement RCRA's statutory requirement banning the land disposal of hazardous waste unless such waste is treated to established levels *or placed in a disposal unit that meets the standards of a no migration demonstration.*

Fitz Aff. Ex. 6 at 3 (emphasis added).

On November 8, 1995, Senator Craig introduced S. 1402. Section 11 of the bill contained language that would amend LWA Section 9(a)(1)(C) by providing that "the Secretary shall not be required to comply with the requirements of 42 U.S.C. § 6924(d)." Fitz Aff. Exs. 7 & 8. Similarly, S. 1402 would amend the savings provisions of the LWA by striking the requirement that WIPP comply with "all terms and conditions of the No-Migration Determination" and replacing it with language indicating that "the [EPA] Administrator and the State [of New Mexico] shall not enforce, and the Secretary shall not be obligated to comply with, the requirements of 42 U.S.C. § 6924(d)." Fitz Aff. Ex. 8 at 5. This statute, of course, is the land disposal prohibition containing the "no migration determination" requirement referenced in Senator Craig's letter exchange with EPA.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

During his floor speech in support of S. 1402, Senator Craig explained the purpose and intended effect of S. 1402:

> This legislation removes unnecessary and delaying bureaucratic requirements, achieves a major environmental objective, saves the taxpayers money, and most significantly for the Nation and Idaho, begins the process of successfully cleaning up and decommissioning the nuclear weapons complexes and temporary storage facilities.
>
> . . .
>
> Idaho currently stores the largest amount of transuranic waste of any State in the Union, but Idaho is not alone as a waste storage State. Washington, Colorado, South Carolina and New Mexico also have large amounts of transuranic waste in temporary storage. *Until WIPP opens, little can be done to clean up and close these temporary storage sites.*
>
> *The agreement recently negotiated between the State of Idaho, the DOE and the U.S. Navy* states that transuranic waste currently located in Idaho will begin to be shipped to WIPP by April 30, 1999. *This legislation will assure this commitment is fulfilled*.
>
> . . .
>
> Section 7 [sic], "Compliance with Environmental Laws and Regulations," will streamline DOE's compliance with applicable environmental laws.
>
> . . .
>
> *It deletes the requirement for a no-mitigation [sic] determination.* In a letter to Senator Kempthorne and me dated September 8, 1995, the Environmental Protection Agency started that a no-mitigation [sic] variance is duplicative because the WIPP is held by the other statutes to a higher standard. EPA states, "A demonstration of nonmitigation [sic] of hazardous constituents will not be necessary to adequately protect human health and the environment." Despite this view, EPA further states that *unless the current law is amended, the WIPP will be forced to comply with the no-mitigation [sic] standards. This unnecessary duplication* would be time consuming and costly.
>
> . . .

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> Idaho and the Nation need to have the WIPP opened sooner rather than later. Each day of delay is costly, *and the potential dangers to the environment and human health resulting from the temporary storage of this waste continues*.
>
> It is time to act. We must, if we are to clean up sites such as Idaho's. We must act to dispose of this task permanently and safety [sic] for future generations. This bill clears the way for action.

Fitz Aff. Ex. 9 (emphasis added).

As is clear from Senator Craig's statement, the purpose of amending the WIPP Land Withdrawal Act was to clear the way to allow transuranic waste to be disposed of at WIPP as quickly as possible. This purpose, in turn, stemmed from the ongoing hazards posed by the indefinite storage of TRUM at locations in Idaho, Washington, and elsewhere. Interestingly, Senator Craig referred to his bill as necessary to allow DOE to comply with a settlement agreement it had reached with Idaho and the United States Navy. It would have been inconsistent with Senator Craig's objective to have introduced legislation that would have allowed DOE to indefinitely store TRUM at sites other than WIPP, or deprived states such as Idaho of regulatory authority over the continued storage of TRUM through the LDR storage prohibition.

The House companion bill to S. 1402 was H.R. 1663. That bill was sponsored by Representatives Skeen (of New Mexico), Schaefer (of Colorado), and Crapo (of Idaho), all of whom represented states with significant volumes of stored TRUM. Fitz Aff. Ex. 10; *see* Fitz Aff. Ex. 11 at 5 (listing transuranic waste volumes in various states). Section 7 of the bill would have amended LWA Section 9(a)(1)(H). In contrast to the narrow exemption of S. 1402, however, H.R. 1663 would have

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

generically exempted designated TRUM from *all* requirements of 40 C.F.R. Part 268. The rationale expressed directly in the bill, however, matches the rationale of the S. 1402 exemption and likewise appears to be solely directed at removing the requirement to obtain a no-migration determination in order to dispose of untreated TRUM *at WIPP*:

> Section 9(a)(1) is amended by adding after and below subparagraph (H) the following: "With respect to transuranic mixed waste designated by the Secretary for disposal at WIPP, such waste *is exempt from the land disposal restrictions published at part 268 of 40 C.F.R.* because compliance with the environmental radiation standards published at part 191 of 40 C.F.R. renders compliance with the land disposal restrictions unnecessary to achieve desired environmental protection and a no migration variance *is not required for disposal of transuranic waste at WIPP*."

Fitz Aff. Ex. 10 at 3 (emphasis added).

This language remained in the bill when it was reported to the House Commerce Committee in April 1996. Despite its generic nature, an April 25, 1996 Commerce Committee Report on H.R. 1663 suggests that the exemption applied only to WIPP. In describing the need for the legislation, the report states:

> One issue of contention has been the applicability of regulations under the Solid Waste Disposal Act (42 U.S.C. 6901-6991i) *at WIPP*. Currently it is anticipated that WIPP will be subject to four major regulatory schemes . . . . According to the Department of Energy's own estimates, complying with the overlapping requirements of 40 C.F.R. Part 268: Land Disposal Restrictions could add up to an additional $500 million *in operating costs at WIPP over the life of the facility*."

Fitz Aff. Ex. 11 at 5 (emphasis added).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

In the report's section-by-section analysis of the legislation, the changes to the environmental compliance section of the LWA (*i.e.,* Section 9) are again described solely in relation to WIPP, with particular emphasis given to the no-migration determination issue:

> *Section 8. Compliance with Environmental Laws and Regulations.*
>
> The applicability of environmental statutes is amended *to eliminate the Solid Waste Disposal Act "no migration" requirements (40 C.F.R. Part 268)*. WIPP remains under the regulatory structure of 40 C.F.R. Parts 191, 194, and 264. In meetings with DOE and EPA, *both principal agencies indicated support for the elimination of the 40 C.F.R. Part 268 restrictions, citing that their application would not be necessary to adequately protect human health and the environment.* Removing this unnecessary and duplicative regulatory burden will have a beneficial effect on opening WIPP and in ensuring a responsible use of taxpayer funding during WIPP's operation.

Fitz Aff. Ex. 11 at 11 (emphasis added). There is no mention *anywhere* in the committee report concerning *any* effect of the amendment on the LDR storage prohibition. There is no mention anywhere in the committee report of the amendment affecting RCRA's application at DOE facilities across the country. There is no mention anywhere in the committee report of the amendment preempting RCRA-corollary state laws. *See generally*, Fitz Aff. Ex. 11.

On July 21, 1995, the House Commerce Committee, Subcommittee on Energy and Power, held what appears to have been the only hearing on H.R. 1663. In his testimony, Representative Skeen of New Mexico (who introduced the bill) couched his support for the Section 9(a)(1) amendment in terms of its effect on the no-migration standard at WIPP:

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> Finally, Mr. Chairman, I would like to express my strong support for exempting WIPP from the no-migration standard in RCRA part 268. Currently, WIPP is subject to not just double, but triple regulation, and *my bill simply deletes part 268 because it imposes unrealistically stringent performance requirements 2,000 feet below the surface*.

Fitz Aff. Ex. 12 at 4 (emphasis added). Representative Skeen also commented on the impetus for opening WIPP, which was to bring an end to the continued temporary storage of transuranic waste based on the risks it poses: "The risk of what we're doing with the waste today is 1,800 times more serious than it would be if it were in that hole 2,000 feet underground. . . . Sitting on pads at INEL in Idaho, sitting on pads at Rocky Flats is the worst configuration for this low level waste." *Id*. at 5.

George E. Dials, Manager of DOE's Carlsbad Area Office, also testified at the July 21 hearing. He confirmed Representative Skeen's view of the need to open WIPP in order to ameliorate the risks of continued indefinite storage:

> The WIPP *is critical to reducing risks* to public health, workers and the environment *posed by defense-related transuranic wastes that are now stored in ten states*: California, Colorado, Idaho, Illinois, New Mexico, Nevada, Ohio, Tennessee, South Carolina and Washington. *The current storage facilities were never intended to provide environmentally sound permanent disposal. Temporary storage containers and systems may eventually degrade, posing risk to the environment and the public*. Some DOE facilities have reached or are near their limits for temporary storage. Some states are concerned with continued temporary storage and are demanding that DOE move this material into a permanent, safe disposal facility. It is critical that we meet our responsibility to solve these problems.

Id. at 12 (emphasis added).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Ramona Trovata, Director of EPA's Office of Radiation and Indoor Air, similarly testified:

> Approximately 70% of the waste that would ultimately be disposed at WIPP has not yet been generated, but it too will come from the major DOE installations. *The long term hazard represented by this waste makes its long term storage at the current DOE sites unacceptable to the people who live near those sites*. . . . *The hazard of the waste means not only that it must be disposed of safely but that there is an important need to find a safe place to dispose of the waste so it can be taken out of storage*.

Id. at 18-19 (emphasis added). Finally, Representative Crapo, a bill co-sponsor, queried DOE witness Dials concerning whether the risks of continued storage had been factored while the (to date) lengthy study of disposal at WIPP had been undertaken:

> I'm wondering whether, as we go through all the analysis that we're going through here, we're also working into the analysis of the risks of doing nothing or of sitting still . . . when we have safety factors and issues at other facilities that should be brought into the evaluation.

Id. at 37. Mr. Dials responded:

> Yes, Sir. We are doing that. We know *if there are any risks* to the public, *they are, in our view*, and it's why we're so aggressively pursuing opening the facility, *much greater where the waste is temporarily stored in facilities that were never designed to have storage for 40 or 50 years*, than where we want to put it, 2150 feet underground in a 250-million-year-old salt formation, in a facility specifically designed to protect the interest of the public and the environment.

Id. (emphasis added).

Significantly, both Mr. Dials' oral testimony on behalf of DOE and the prepared statement accompanying his testimony make no mention of a need to remove the LDR storage prohibition as it applied to TRUM being stored around the country.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

This is despite the fact that in passing the Federal Facility Compliance Act just four years earlier, Congress had, over DOE's objection, expressly *affirmed* the application of state authority over TRUM through the exercise of the storage prohibition. *See* discussion *infra*. In fact, Mr. Dials' statement indicated assent to the status quo, indicating that "As Secretary O'Leary stated in May, the Department *does not believe additional legislation is required*." *Id.* at 11 (emphasis added).

Interestingly, DOE also actively objected to language that would have restricted EPA in its oversight role at WIPP. Mr. Dials' prepared statement states:

> DOE opposes the removal of EPA as the regulator of WIPP, we do not want to be self-regulating. The Department's history of self-regulation is, in many analysts' views, a chief reason for many of our current waste and contamination problems.

Id. at 14. Similar concerns were voiced by EPA witness Trovato, *id*. at 17, and other witnesses. The language to limit EPA as a WIPP regulator was never enacted. As will be seen below, later testimony from the co-sponsors of the eventual LWA amendment confirmed Congress' interest in preserving independent regulatory oversight of DOE's activities.

In contrast to DOE's silence on the storage prohibition, one other witness, New Mexico Assistant Attorney General Lindsey Lovejoy, recognized a potential effect of the language of H.R. 1663 on transuranic wastes stored at other sites. Mr. Lovejoy indicated that in his opinion, the generic scope of the amendment to LWA Section 9(a)(1), which would exempt designated TRUM from *all* requirements of 40 C.F.R. Part 268, would affect application of the storage prohibition at DOE sites other than

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

WIPP. Mr. Lovejoy indicated that the "incentive" for DOE to move waste to WIPP based on the exercise of state authority under the storage prohibition (in concert with the Federal Facility Compliance Act) would thus be lost. Following up on Representative Schaefer's earlier questioning of DOE witness Dials,[6] Mr. Lovejoy testified as follows:

> MR. LOVEJOY . . . I think, Mr. Chairman, you inquired about the effect of this bill on waste located at other locations. The language of the bill is that with respect to transuranic mixed waste designated by the Secretary for disposal at WIPP, and that could include waste at Rocky Flats or at INEL, such waste is exempt from the land disposal restrictions published at Part 268 of 40 C.F.R.. *Those restrictions include the prohibition on storage of waste without compliance with the LDRs*. So the waste at other locations would be affected by this bill *and the incentive, which was really the origin of the Federal Facility Compliance Act, would be removed*.
>
> MR. SCHAEFER. The Chair is very familiar with the Federal Facilities [sic] Compliance Act.
>
> MR. LOVEJOY. I appreciate that. I appreciate the Chair's role in that statute. . . .

Id. at 49 (emphasis added).[7]

---

[6] Representative Schaefer's inquiry of Mr. Dials is found on pages 28-29 of Exhibit 12 to the Affidavit of Andrew A. Fitz. Mr. Schaefer questioned Mr. Dials concerning whether TRUM would have already met LDR disposal standards prior to being shipped to WIPP.

[7] In 1991, Representative Schaefer introduced the Federal Facility Compliance Act in the House with Representative Eckart of Ohio.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Accompanying Mr. Lovejoy's testimony was a prepared statement for the record written by New Mexico Attorney General Tom Udall. The statement focused on the precedent to be set by enacting "ad hoc exemptions" related to *particular* DOE sites. It also echoed Mr. Lovejoy's concern about the undermining effect the amendment may have on the Federal Facility Compliance Act:

> Moreover, it would be extremely bad policy to enact ad hoc exemptions from the hazardous waste laws for DOE sites. If an exemption is made for WIPP, there will be many further requests for exemption. *In 1992 Congress enacted the Federal Facility Compliance Act, Pub. L. 102-386, precisely to provide a framework to bring DOE facilities into compliance with RCRA restrictions on storage and disposal of mixed hazardous and radioactive waste.* If Congress is now to deal with such problems by enacting particular indulgences, *the ongoing process of DOE-state negotiations under the FFCA will be upset*. Since there is no expressed need for such consequences, I oppose it.

Id. at 51 (emphasis added).

Significantly, the version of the legislation that was later proposed in both the Senate and House (and ultimately enacted as part of the National Defense Authorization Act for Fiscal Year 1997) did *not* include the generic reference to 40 C.F.R. Part 268. Instead, it pointed to the specific treatment standard and disposal restriction subsections of the RCRA LDR statute, *without* making reference to the storage prohibition. The legislative history of both the Senate and House defense authorization bills, S. 1745 and H.R. 3230, voices the same concerns and identifies the same intended effects as S. 1402 and H.R. 1663. Likewise, the legislative history of

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

S. 1745 and H.R. 3230 is equally silent with respect to *any* effect of the bills on the LDR storage prohibition, the application of RCRA to DOE sites around the country, or the application of RCRA-corollary state laws.

Senator Craig proposed a floor amendment (Amendment No. 4085) to the Senate defense authorization bill (S. 1745) on June 20, 1996. *See* Fitz Aff. Ex. 13. The amendment added much of what was originally proposed in S. 1402 to the text of the LWA. *Id*. The language regarding the LWA Section 9(a)(1) exemption, however, was slightly different than S. 1402 and significantly different than H.R. 1663. Instead of referring just to 42 U.S.C. § 6924(d) (as did S. 1402) or referring generically to the entire Part 268 of 40 C.F.R. (as did H.R. 1663), the amendment language matched the exemption as it was ultimately enacted: referring specifically to subsections (d)-(g) and (m) of 42 U.S.C. § 6924, but not subsection (j) (the storage prohibition).

Senator Craig's floor statement in support of the S. 1745 amendment repeated almost verbatim his floor statement upon the introduction of S. 1402. Cf. Fitz Aff. Ex. 13 at S6588-S6589 with Ex. 9 (quoted above). Just as with S. 1402, Senator Craig indicated the purpose of his amendment was to clear the way to allow for transuranic waste to be disposed of at WIPP as quickly as possible. This was necessitated by the ongoing hazards posed by the indefinite storage of TRUM at locations in Idaho, Washington, and elsewhere. Just as he did when introducing S. 1402, Senator Craig referred to his bill as necessary to allow DOE to comply with the settlement agreement it had reached with Idaho and the United States Navy. And, just as before, Senator Craig was silent with respect to any effect of the amendment on

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

the application of the storage prohibition at DOE sites around the country. As pointed out earlier, such an effect would be directly contrary to his goal of supporting the Idaho settlement as an exercise of state authority over TRUM management. Finally, Senator Craig confirmed that the S. 1745 amendment "does not remove EPA at the DOE regulator of the WIPP," noting that "DOE has stated numerous times that it does not want to self regulate." *Id.* at S6589.

Other floor statements came from co-sponsoring Senators Kempthorne of Idaho and Bingaman and Domenici of New Mexico, as well as Senator Thurmond of South Carolina (again, all representing states with significant volumes of transuranic waste). Senator Kempthorne echoed Senator Craig's position that the Idaho settlement "could not go forward without this amendment." *Id.* at S6591. He also focused on the amendment's effect to "simplify the land withdrawal process" at WIPP, which included removing "duplicative regulatory requirements" at the facility (a reference to the no-migration issue). *Id*.

This focus was repeated in the statements of Senators Bingaman, Domenici, and Thurmond. *See id*. at S6589-S6591. Senator Domenici, for instance, noted:

> [T]he amendment, at the suggestion of EPA, subjects WIPP to the radiation protection standards and removes the application of the Solid Waste Disposal Act. This is necessary to remove the confusion that occurs by imposing two sets of regulations. [. . .] DOE and EPA now agree that demonstrating compliance with both standards is redundant—they agree compliance is best proven by meeting the radiation release standards.

Id. at S6590-S6591. Once again, this demonstrates that Congressional focus was on removing obstacles to disposal *at WIPP*, as represented by the need to meet the

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

no-migration standard.[8] Consistent with every other piece of legislative history, the floor statements contain no mention of any effect of the amendment on the LDR storage prohibition; no mention of the amendment affecting RCRA's application at *other* DOE facilities across the country; and no mention of the amendment preempting RCRA-corollary state laws. *See generally*, *id*. at S6588-S6591. In addition, Senators Domenici and Bingaman both noted the importance of retaining EPA's independent oversight role at WIPP, with Senator Bingaman calling the removal of independent oversight a "fatal flaw" of the earlier versions of S. 1402 and H.R. 1663, and Senator Domenici calling the retention of independent oversight at WIPP a "critical improvement" in the final bill. *Id*. at S6590.

Finally, on the House side, the conference report on H.R. 3230 summarizes the LWA amendments. The summary provides in its full text:

> *Waste Isolation Pilot Plant Land Withdrawal Act amendments (secs. 3181-3191)*
>
> The Senate amendment contained a series of provisions (secs. 3181-3191) that would modify the Waste Isolation Pilot Plant (WIPP) Land Withdrawal Act (Public Law 102-579). Requirements of the WIPP Land Withdrawal Act associated with the now-canceled WIPP "test phase" would be eliminated. The prerequisites to opening WIPP would be clarified and the 180-day congressional notification requirement would be reduced to 30 days. *The requirement that WIPP meet land disposal restrictions of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) would be eliminated*. DOE would be granted greater authority to

---

[8] Indeed, there is no "confusion" or "redundancy" between the two sets of regulations elsewhere, because radiation disposal standards are not in effect for transuranic waste that is *stored* (as opposed to disposed) at other sites.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> determine whether engineered or natural barriers are sufficient to meet compliance with applicable environmental regulations. The Environmental Protection Agency would retain its ability to conduct timely reviews of DOE compliance applications. A sense of the Congress provision would encourage the Secretary to pursue all necessary actions to begin waste disposal operations not later than November 30, 1997. Finally, the Department of Energy would be authorized to make a one-time payment of $20.0 million to the State of New Mexico to begin road upgrades necessary to begin full scale shipping operations to WIPP. This payment would be considered an advance payment of amounts due to the State of New Mexico pursuant to the provisions of section 15(a) of the WIPP Land Withdrawal Act.
>
> The House bill contained no similar provision.
>
> The House recedes with a clarifying amendment that would add a provision that would reduce by one the total number of payments due to the State of New Mexico under section 15(a) of the WIPP Land withdrawal Act and clarify that all applicable health and safety regulations would be met prior to commencement of disposal operations.

Fitz Aff. Ex. 14 (emphasis added). Once again, the focus is on easing the obstacles to commencing disposal *at WIPP*. Once again, there is no mention of any effect of the amendment on the LDR storage prohibition; no mention of the amendment affecting RCRA's application at *other* DOE facilities across the country; and no mention of the amendment preempting RCRA-corollary state laws.

Amendment by implication may only be found where legislative intent is clear and manifest. *United States v. Dahl,* 314 F.3d 976, 978 (9th Cir. 2002). Implied preemption of state law may only be found where congressional intent is clear and manifest. *In re Cybernetic Services, Inc.,* 252 F.3d 1039, 1046 (9th Cir. 2001), *cert. denied Moldo v. Matsco, Inc.,* 534 U.S. 1130 (2002). No such intent can be found in this case.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

In fact, DOE's construction of LWA Section 9(a)(1) conflicts with the legislative history presented above. As stated earlier, five key points can be drawn from the legislative history of the Section 9(a)(1) exemption. First, the clear purpose of the exemption is to speed up the disposal of TRUM at WIPP by removing an obstacle to disposal *once TRUM arrives at WIPP*—namely, the need to meet the no-migration standard in order to dispose of TRUM that has not been treated to LDR standards. Second, the legislative history is utterly silent regarding any intent to amend RCRA and preempt state law by lifting the storage prohibition related to TRUM at other DOE facilities around the country. Third, the legislative history repeatedly recognizes that disposal of TRUM at WIPP should be accelerated to eliminate the hazards associated with continued long-term storage of TRUM. Fourth, the evolution of the language of the Section 9(a)(1) supports the plain-language reading that Congress truly intended the exemption to operate on only those provisions of 42 U.S.C. § 6924 specifically enumerated in the statute. Finally, it is clear that Congress took a conscious interest in preserving independent regulatory oversight of DOE's activities.

DOE's construction of LWA Section 9(a)(1) conflicts with these points. The storage prohibition is the vehicle under RCRA and state RCRA-corollary laws that drives hazardous waste toward treatment and/or disposal. Absent the storage prohibition, no statute or rule under RCRA (or the Washington HWMA) directly precludes hazardous waste from being stored indefinitely. With respect to TRUM

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

specifically, no statute or rule other than the storage prohibition compels DOE to move the waste toward disposal.

As established earlier, Congress enacted the storage prohibition based on the belief that despite RCRA's "safe storage" requirements, allowing the continued storage of large quantities of hazardous waste poses health threats equally serious to those posed by disposal itself. *Hazardous Waste Treatment Coun. v. United States Envtl. Prot. Agency*, 886 F.2d 355, 357 (D.C. Cir. 1989). This was the same belief behind Congress' effort through the LWA amendments to remove obstacles to accelerated disposal at WIPP.

Congress included the need to meet the no-migration standard amoung these obstacles because, based on EPA's input, Congress considered TRUM safe for disposal at WIPP in an untreated form. While Congress indicated TRUM was safe for untreated disposal at WIPP, however, it did *not* indicate that untreated TRUM was safe to store indefinitely at DOE sites around the country.

This is precisely the effect, however, of DOE's construction of LWA Section 9(a)(1). Under DOE's construction, by simply "designating" TRUM for future disposal at some undetermined time at WIPP, the waste can be stored indefinitely while at the same time being subject to no treatment requirements or, alternatively, requirements for disposal at WIPP in lieu of treatment. DOE's reading of LWA Section 9(a)(1) grants DOE unfettered discretion to exempt TRUM from the federal and state law that drives TRUM toward disposal at WIPP. Given the above legislative history, with its emphasis on accelerating waste movement toward WIPP,

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

confirmation of independent regulatory oversight of DOE, and utter silence regarding any intent to affect the storage prohibition throughout the DOE complex, it is highly unlikely that Congress' intent was to, in effect, write DOE a blank check to indefinitely store significant volumes of waste around the country.

DOE's unbounded application of the exemption, and its post hoc rationalizations for "designations" by the Secretary of Energy for disposal at WIPP, underscore this point. First, by DOE's own admission, it has no "procedures, policies, regulations, orders, directives, guidance, or other written documents" that establish the process for, or criteria governing, designations by the Secretary for disposal of transuranic mixed waste at WIPP. *See* Fitz Aff. Ex. 19 at 3 (United States' Responses to the State of Washington's First Set of Interrogatories and Requests for Production of Documents). Second, DOE has made inconsistent representations as to when and how TRUM has been purportedly designated by the Secretary of Energy.[9] Third,

---

[9] For example, DOE first argued that the ETEC and Battelle TRUM were designated for disposal at WIPP in DOE's 2002 ROD deciding to ship this waste to Hanford for indefinite storage and treatment, pending ultimate disposal at WIPP. Federal Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 52 (citing 67 Fed. Reg. at 56991-92). Then, in its June 30, 2004 TRU ROD, DOE indicated that the Battelle waste was originally designated for disposal at WIPP in a prior record of decision entitled the WIPP II SEIS ROD (which included a general decision to dispose of up to 175,600 cubic meters of defense TRUM generated from

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

DOE purports to designate waste for disposal at WIPP that, by DOE's own admission, it has no legal authority to dispose of at the facility.[10] There is no guarantee that DOE will ever obtain the approvals necessary to dispose of some of this waste, or will obtain such approvals within any reasonable timeframe. Consequently, if DOE's construction of the WIPP Land Withdrawal Act is correct, such wastes will remain at Hanford untreated and with no enforceable schedule to ensure that they are properly treated and/or disposed. Given the above legislative history, Congress could not have intended this result.

3. Site Treatment Plans Under the Federal Facility Compliance Act Can be Used to Harmonize Any Arguable Conflict Between the Storage Prohibition and LWA Section 9(a)(1)

DOE's key policy argument against the State's construction of LWA Section 9(a)(1) is that the effect of the State's reading *also* creates what Congress sought to avoid: the unnecessary treatment of wastes that will be disposed of at WIPP.

---

various DOE sites), and was simply later "confirmed" in DOE's 2002 ROD *See* Fitz Aff. Ex.2 at 39448 (2004 TRU ROD).

[10] For example, DOE does not have approval from the State of New Mexico to dispose of remote-handled TRUM at WIPP. It does not expect to obtain that approval and begin disposing of remote-handled TRUM at WIPP until 2006. *See* Fitz Aff. Ex. 2 at 39448 (2004 TRU ROD). DOE also does not have all approvals necessary to dispose of TRUM contaminated with polychlorinated biphenyls wastes. *Id.*

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

See, e.g., Defendants' Sur-Reply to the States's Hazardous Waste Management Act Claim at 7. However, DOE ignores the opportunity to harmonize any arguable conflict between Section 9(a)(1) and the storage prohibition through application of the site treatment plan (compliance agreement) provisions of the Federal Facility Compliance Act. This opportunity to harmonize arguable conflict provides a final reason why DOE's construction should be rejected.

In 1992, the same year the original WIPP Land Withdrawal Act was passed, Congress passed the Federal Facility Compliance Act (FFCA). *See* Pub. L. 102-386, Title I, § 102(a), (b), October 6, 1992, 106 Stat 1505, 1506. Among other things, the FFCA clarified that the federal government's waiver of sovereign immunity under RCRA fully applies to federal facilities. With specific respect to DOE, Congress partially delayed that waiver with respect to fines and penalties related to mixed waste and compliance with the LDR storage prohibition. Pub. L. 102-386, § 102(c)(3)(B); *see* historical note following 42 U.S.C. § 6961. As the House conference report on the final (enacted) bill summarized:

> *With respect to violations of section 3004(j) of the Solid Waste Disposal Act involving the storage of mixed waste*, the conference substitute delays for three years the effective date of the waiver of sovereign immunity added by the Federal Facility Compliance Act for fines and penalties, *in order to provide the Department of Energy (DOE) with sufficient time to submit and obtain approval for plans for the development of treatment capacity and technologies* for its facilities that generate and store mixed waste. The Department of Energy has stated that three years is both necessary and adequate to develop these plans. After the three-year period, for plans that have been approved and where a compliance order has been issued and is in effect, the *DOE would be subject to fines and penalties for violations of such plans, but not for violations of section 3004(j) involving the storage of mixed waste*.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Fitz Aff. Ex. 15 at 18 (H.R. Conf. Rep. No. 102-886 (Sept. 22, 1992) (emphasis added).

The "plans" referenced in the above report are commonly known as "site treatment plans" (STPs). As indicated, STPs are intended as the vehicles for DOE to develop plans and schedules for developing "treatment capacities and technologies" to address mixed waste backlogs being stored in violation of the storage prohibition. *See* 42 U.S.C. § 6939c(b)(1)(A)(i). Once approved by a state and incorporated into a state order, such plans constitute compliance schedules. 42 U.S.C. § 6939c(b)(2)(C). So long as DOE is in compliance with a plan, it will not be subject to fines or penalties for storage prohibition violations related to waste addressed by the plan.

Congress recognized that DOE's volumes of untreated and temporarily stored TRUM were among the volumes of waste Congress expected to be included within the STP process. In fact, during deliberation on the FFCA, TRUM that included "waste destined for the WIPP under the no migration petition" was identified as mixed waste affected by the bill. Fitz Aff. Ex. 16 at 11-12.

Because some DOE facilities were already subject to existing orders requiring schedules for developing LDR treatment options, the 1992 FFCA provision exempted those facilities from the site treatment plan requirement. 42 U.S.C.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

§ 6939c(b)(1)(A)(ii). Instead, the pre-existing orders were presumed to already serve the site treatment plan function.[11]

One of these pre-existing orders was the Hanford Federal Facility Agreement and Consent Order (HFFACO). In 1989, Ecology, EPA, and DOE entered into the HFFACO. The HFFACO establishes numerous milestones (schedules and associated regulatory requirements) for Hanford cleanup, including milestones related to LDR waste. It remains the primary driver implementing various cleanup authorities at Hanford. EPA and Ecology agreed that based on the HFFACO's status as a pre-existing order, Hanford was exempted from the requirement to submit a site-specific treatment plan under 42 U.S.C. § 6939c(b)(1)(A)(ii).[12] Stanley Aff. ¶ G.

Under the HFFACO, the M-91 milestone series relates to TRU/TRUM waste management. Stanley Aff. ¶ H. For more than a decade after the FFCA created its site treatment plan requirement, HFFACO milestones for characterizing and treating Hanford's TRUM were never agreed upon and incorporated into the HFFACO. *See* Stanley Aff. ¶¶ I-O. More recently, the State and DOE have agreed, conditioned on

---

[11] Congress waived sovereign immunity immediately upon the effective date of the provision (October 6, 1992) with respect to mixed waste and the LDR storage prohibition as addressed under such orders. Pub. L. 102-386, § 102(c)(4).

[12] EPA was a decision-maker because it enforced LDRs in Washington pursuant to RCRA until 1997, when the State became authorized to enforce the provisions under state law.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

the outcome of this motion, to add HFFACO compliance schedules for the storage and treatment of Hanford's TRUM or, as an alternative to treatment, the certification of TRUM for shipment to WIPP. Amended Complaint ¶¶ 131-38.

In view of the fact that TRUM may be legally disposed at WIPP without treatment to LDR standards, it is entirely reasonable for a state such as Washington to allow the certification of waste for shipment to WIPP to satisfy the treatment requirement for the purpose of establishing enforceable compliance milestones in a site treatment plan equivalent (the HFFACO). It is, in effect, no different than an STP establishing a compliance schedule for backlogged waste to leave a site for further management elsewhere. *See* 42 U.S.C. § 6939c(b)(1)(C) ("A plan required under this subsection may provide for centralized, regional, or on-site treatment of mixed wastes, or any combination thereof"). The "conflict" that DOE creates between the storage prohibition and LWA Section 9(a)(1) is thus illusory.

That this is the case is confirmed by examining examples of the manner in which DOE's TRUM volumes were addressed in STPs prior to the 1996 amendment of LWA Section 9(a)(1). By 1996, when the LWA was amended to include the Section 9(a)(1) exemption, DOE was already some three years into the experience of negotiating STPs with states pursuant to the FFCA. The storage prohibition unquestionably applied to DOE's volumes of backlogged TRUM. WIPP was recognized as the intended repository for such TRUM (as it was during passage of the FFCA in 1992). Importantly, DOE was actively pursuing its "no migration

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

determination" for WIPP from EPA at the time and expected EPA to issue a final ruling on DOE's petition in June 1997. *See* Fitz Aff. Ex. 12 at 13 (testimony of DOE Carlsbad Area Office manager George E. Dials). Just like the LWA Section 9(a)(1) exemption, this determination would have exempted TRUM being disposed at WIPP from being treated to LDR standards prior to disposal. *See* 42 U.S.C. § 6924(d) Based on this, *even prior to the amendment of LWA Section 9(a)(1)*, DOE *did not expect* that it would have to treat TRUM to LDR standards prior to it being disposed at WIPP. The situation prior to the 1996 amendment, then, is no different than the situation today.

Significantly, as seen in the above legislative history, DOE did not go to Congress asking for the LWA Section 9(a)(1) exemption. *See* discussion at 29, *supra* (testimony of George E. Dials). It did not complain that states were forcing TRUM toward millions of dollars of "unnecessary treatment," even at a time when STPs were actively being negotiated based on the storage prohibition. The likely reason is confirmed by examining just two examples of pre-1996 STPs.

Attached as Exhibits 17 and 18 to the Affidavit of Andrew A. Fitz are one STP and one order requiring compliance with an STP. Both predate the 1996 LWA amendments. *See* Fitz Aff. Exs. 17 & 18. They relate to two DOE sites with substantial TRUM volumes: the Oak Ridge Site (Tennessee); and Rocky Flats (Colorado). *Id*. The Oak Ridge STP is dated September 1995. It addresses storage prohibition compliance for TRUM as follows:

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> Compliance with the LDR treatment standards for the MTRU wastes will be met by using the no-migration variance approach described in 40 CFR 268.6. *A no-migration variance will not require that the MTRU wastes meet the LDR treatment standards. Instead, MTRU wastes will be processed to only meet the WIPP Wash. Admin. Code* [waste acceptance criteria]. Under this strategy, DOE shall continue interim storage of MTRU wastes, continue preparation of such wastes for shipment to WIPP, and dispose of such wastes in WIPP.
>
> . . . .
>
> *If the WIPP should not be available* for any reason, *alternative strategies will be developed* for managing MTRU waste, *including treatment* of CH and RH-TRU waste to LDR treatment standards.

Fitz Aff. Ex. 17 at 42-43 (emphasis added). The STP contains milestones for initiating and completing TRUM shipment to WIPP. *Id*. at 42.

Similar provisions appear in the compliance order related to Rocky Flats, which was entered between DOE and the Colorado Department of Public Health and Environment (CDPHE) in October, 1995:

> Pursuant to 42 U.S.C. § 6939c(b)(5)(A)(i), DOE and CDPHE hereby AGREE that the Site Treatment Plan as approved *adequately addresses compliance for Mixed Transuranic waste with the storage prohibition at § 3004(j) of RCRA* so long as the following requirements are satisfied: (i) WIPP shall commence acceptance of Mixed Transuranic waste from Rocky Flats on or before the end of 1998; (ii) all of the Mixed Transuranic waste at Rocky Flats shall be able, *either with or without further treatment or processing,* to meet the WIPP Waste Acceptance Criteria . . . .
>
> . . . .
>
> If one or more of the above requirements are not satisfied…DOE shall be required to either (a) change the Site Treatment Plan…to provide for the development of treatment capacities and technologies to treat the covered Mixed Transuranic waste to the standards promulgated pursuant to § 3004(m) of RCRA, or (b) otherwise address to the satisfaction of CDPHE compliance of the Mixed Transuranic waste with the storage prohibition established in § 3004(j) of RCRA.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Fitz Aff. Ex. 18 at 10 (emphasis added).

Even before the Section 9(a)(1) exemption, then, at a time when the storage prohibition unquestionably applied *and* DOE did not expect it would have to treat TRUM to LDR standards for disposal at WIPP, DOE was able to negotiate STPs under the FFCA that allowed for TRUM to be shipped to WIPP as an alternative to treatment. These are, in effect, the same conditions that exist today based on the State's construction of LWA Section 9(a)(1). They are also the same conditions that will be in effect if the contingent TRUM treatment or certification milestones in HFFACO Change Package M-91 take effect. *See* Fitz Aff. Ex. 20.

No "conflict" existed between the storage prohibition and DOE's expectations prior to 1996, and no "conflict" between the storage prohibition and LWA Section 9(a)(1) exists today under Washington's construction. In the absence of such a conflict, there is no basis to conclude that Congress intended to impliedly amend RCRA, or impliedly preempt RCRA-corollary state law. *See, e.g., Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536 (D.C. Cir. 2004) ("In the absence of irreconcilability between the AEA and NWPA, there is no basis to conclude that in enacting the NWPA Congress implicitly repealed or superseded the NRC's authority").

To conclude, DOE's construction of LWA Section 9(a)(1) requires the Court to find that in enacting the 1996 LWA amendments, Congress impliedly amended RCRA and impliedly preempted RCRA-corollary state laws. There is, however, no evidence of Congress' "clear and manifest intent" to produce either result. In fact,

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

there is no evidence of *any sort* that Congress intended such results. Instead, the legislative intent fully supports the State's plain language reading of LWA Section 9(a)(1). Furthermore, the site treatment plan provisions of the FFCA provide a way to harmonize the arguable conflict DOE maintains is created by the State's construction. The LWA Section 9(a)(1) exemption does not apply to the storage prohibition under Washington's Hazardous Waste Management Act, Wash. Admin. Code § 173-303-140(2)(a).

IV. CONCLUSION

Based upon the above facts and argument, the State respectfully requests that the Court grant partial summary judgment to the State on Count 3 of the State of Washington's First Amended Compliant for Declaratory and Injunctive Relief.

DATED this _____ day of August, 2004.

CHRISTINE O. GREGOIRE
Attorney General

JOSEPH E. SHORIN III, WSBA #19705
ANDREW A. FITZ, WSBA #22169
Assistant Attorneys General

Attorneys for Plaintiff
State of Washington
(360) 586-6770

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760